(20)

File Date: 12/7/2006

No. 05-1345

IN THE

Supreme Court of the United States

UNITED HAULERS ASSOCIATION, INC., *et al*,

Petitioners,

v

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY, *et al*,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ROCKLAND COUNTY SOLID WASTE MANAGEMENT AUTHORITY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

BRIDGET GAUNTLETT
General Counsel
ROCKLAND COUNTY SOLID WASTE MANAGEMENT AUTHORITY
420 Torne Valley Road
Hillburn, NY 10931

ROBERT BERGEN*
TENO WEST
LEAH GRIGGS PAULY
HOLLAND & KNIGHT LLP
195 Broadway
New York, NY 10007
(212) 513-3200

Attorneys for Amicus Curiae

* *Counsel of Record*

205226

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Interest of Amicus Curiae	1
Summary Of The Argument	3
Argument	4
I. The State Action Exemption From Anti-Trust Restrictions, Long Recognized By The Court As An Attribute Of State Sovereignty, Should Not Be Eroded By An Unwarranted Extension Of Dormant Commerce Clause Jurisprudence	4
II. Public Monopolies Designed To Implement Police Power And Which Even-Handedly Displace Competition Do Not Discriminate Against Interstate Commerce	10
III. The Preservation of Public Monopolies Is Essential To Our Federalist Form Of Government	13
Conclusion	18

TABLE OF CITED AUTHORITIES

Page

Cases:

Barbier v Connolly,
113 U S 27, 5 S Ct 357,
28 L Ed 923 (1884) 10, 12

Breard v City of Alexandria, La ,
341 U S 622, 71 S Ct 920,
95 L. Ed. 1233 (1951) 8, 11

C&A Carbone, Inc v Town of Clarkstown,
511 U.S 3838, 114 S Ct 1677,
128 L Ed 2d 399 (1994) 13

California Reduction Co
v Sanitary Reduction Works of San Francisco,
199 U S. 306, 26 S. Ct. 100,
50 L Ed. 204 (1905) 11

Chemical Waste Mgmt v Hunt,
505 U S 334, 112 S Ct. 2009,
119 L Ed. 121 (1992) 13

City of Lafayette, La
v La Power & Light Company,
435 U S 389, 98 S Ct. 1123,
55 L Ed 2d 364 (1978) 5, 6

Fort Gratiot Sanitary Landfill, Inc
v Michigan Dep't of Natural Res ,
504 U S. 353, 112 S Ct. 2019,
119 L. Ed. 2d 139 (1992) 12

Cited Authorities

Page

Genentech, Inc v Eli Lilly and Co,
998 F.2d 931 (Fed. Cir. 1993), *cert denied sub nom*, 510 U S 1140, 114 S. Ct 1126, 127 L. Ed 2d 434 (1994), *overruled on other grounds by* 515 U.S 277, 115 S. Ct. 2137, 132 L Ed 214 (1995) . . 6

General Motors Corp v Tracy,
519 U S. 278, 117 S. Ct 811, 136 L Ed. 761 (1997) 9, 14

Gibbons v Ogden,
9 Wheat. 1, 6 L. Ed 23 (1824) 14

H P Hood & Sons, Inc v Du Mond,
336 U S. 525, 69 S Ct 657, 93 L Ed 865 (1949) 9, 10, 13

Hancock Indus v Schaeffer,
811 F 2d 225 (3d Cir. 1986) 8, 12

Hoover v Ronwin,
466 U S 558, 104 S Ct 1989, 80 L. Ed. 1989 (1984) 6

Huron Portland Cement Co v City of Detroit,
362 U S 440, 80 S Ct 813, 4 L Ed 2d 852 (1960) 8

Cited Authorities

Page

New Energy Co of Ind v Limbach,
486 U S. 269, 108 S. Ct 1803,
100 L Ed. 2d 302 (1988) 16

New Orleans Water-Works, Co v Rivers,
115 U S 674, 6 S Ct. 273,
29 L Ed. 525 (1885) 14

New State Ice Co v Liebmann,
285 U.S 262, 52 S. Ct. 371,
76 L Ed 747 (1932) 11

Northern Pacific Ry Co v United States,
356 U S 1, 78 S Ct 514,
2 L. Ed 2d 545 (1958) 4

Oklahoma Tax Comm'n v Jefferson Lines,
514 U.S 175, 115 S. Ct 1331,
131 L Ed. 2d 261 (1995), *reh'g denied*
514 U S. 1135, 115 S Ct 2018 (1995) 9

Oregon Waste Sys , Inc
v Dep't of Envtl Quality of Or,
511 U S 93, 114 S Ct 1345,
128 L Ed. 2d 13 (1994) 11, 13

Parker v Brown,
317 U S 341, 63 S. Ct 307,
87 L Ed 315 (1943) 5, 15

Cited Authorities

Page

Philadelphia v New Jersey,
437 U.S 617, 98 S Ct 2531,
57 L. Ed. 2d 475 (1978) 11, 12

Railroad Co v Husen,
95 U S 465, 24 L Ed 527 (1877) . . . 10

Slaughter-House Cases,
83 U S 36, 21 L Ed. 394,
16 Wall. 36 (1872) 14

Standard Oil Co v United States,
221 U S. 1, 31 S Ct 502,
55 L Ed. 619 (1911) 4

Town of Hallie v City of Eau Claire,
471 U S 34, 105 S Ct 1713,
85 L Ed 2d 24 (1985) 6, 8, 14

Tyler v Pipe Indus
v Wash State Dep't of Revenue,
483 U.S 232 (1987) 16

USA Recycling, Inc v Town of Babylon, Inc,
66 F.3d 1272 (2d. Cir 1995), *cert denied*,
517 U.S 1135, 116 S Ct 1419,
134 L Ed.2d 544 (1996) 11

United States v Am Linseed Oil Co,
262 U S. 371, 43 S. Ct 607,
67 L Ed 1038 (1923) 5

Cited Authorities

Page

United States v Topco Assoc, 405 U S 596, 92 S. Ct. 1126, 31 L. Ed 2d 515 (1972) 5

Federal Statutes:

Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-6 6

Resource Conservation and Recovery Act, 42 U S.C § 6901(a)(4) 17

Sherman Act, 15 U S C § 1 4

U S Const art. I, § 8 8

State Statutes:

N Y. Environmental Conservation Law §§ 27-106-07 7

N.Y. Public Authorities Law, §§ 2049-aa et seq 7

N.Y. Public Authorities Law, § 2049-tt 1, 7, 8

N Y Public Authorities Law §§ 2053-a et seq 1

N Y Public Authorities Law, § 2053-v . . . 1, 7, 8

Cited Authorities

Page

Miscellaneous:

Lincoln L Davies, Note, *If You Give The Court A Commerce Clause An Environmental Justice Critique Of Supreme Court Interstate Waste Jurisprudence*, 11 Fordham Envtl. L J. 207 (1999) 13, 17

James G Hodge, Jr , *The Role of New Federalism and Public Health Law*, 12 J L & Health 309 (1998) 14

The Federalist No 45 (Alexander Hamilton) (E.H. Scott ed. 1898) 5

Wendy E. Parmet, *Health Care and the Constitution Public Health and the Role of the State in the Framing Era*, 20 Hastings Const L Q. 267 (1992) 13

James A Tobey, *Public Health and the Police Power*, 4 N.Y U L Rev 126 (1927) 13, 14

INTEREST OF AMICUS CURIAE

Amicus Curiae Rockland County Solid Waste Management Authority ("RCSWMA")[1] is a public benefit corporation established in 1994 by an act of the Legislature of Rockland County, New York in accordance with the New York State Public Authorities Law [2] The State of New York has entrusted RCSWMA to protect Rockland County residents from the environmental and health hazards that result from the improper processing and disposal of solid waste RCSWMA is interested in the decision rendered in this case because, like Respondents, it has been delegated the authority to implement an integrated solid waste management plan by displacing competition through a public service monopoly [3]

RCSWMA regulates the processing of solid waste by contracting with Rockland County communities to serve as the exclusive provider of certain types of waste management services By displacing competition through monopoly control, RCSWMA is able to provide the comprehensive waste management necessary to satisfy the solid waste reduction, reuse and recycling objectives of the integrated solid waste management plan enacted by county government If the Court reverses the decision of the Second Circuit, as urged by Petitioners, the ability of state and local governments

1 No person or entity other the Amicus Curiae or its counsel made a monetary contribution to the preparation or submission of this brief Written consent to file this brief has been provided by both parties

2 *See* N Y Pub Auth Law, §§ 2053-a et seq (McKinney 2006)

3 *See* N Y Pub Auth Law, §§ 2049-tt, 2053-v(2) (McKinney 2006), Res Br 5

to provide public services through the well-established and heretofore legally protected public monopoly structure will be seriously impaired. RCSWMA, as Amicus Curiae, therefore, urges the Court to affirm the decision below.

Rockland County, New York is a largely suburban community located sixteen miles northwest of New York City Rockland County is home to five towns and nineteen villages with a total of approximately 292,916 residents. RCSWMA serves these municipalities through five publicly owned state-of-the-art solid waste management facilities operated by a combination of employees and private contractors. These facilities include a household hazardous waste facility, a materials recovery facility, a co-composting facility, a yardwaste composting facility, and a transfer station and preprocessing facility. The five facilities together process more than 220,000 tons of solid waste per year

The Rockland County integrated solid waste management plan was enacted to address the continued increase in the County's production of solid waste and the impending closure of the County's municipal landfills. As mandated by state policy, the County's solid waste management plan was intended to reduce the total amount of landfilled material by increasing the amount of recycled solid waste Oversight by the RCSWMA and the establishment of its processing facilities has dramatically reduced the amount of solid waste ultimately required to be disposed at a landfill Unlike prior solid waste regulation, RCSWMA's public service monopoly in solid waste processing provides Rockland County residents with a single publicly accountable regulatory body responsible for the achievement of legislatively established environmental goals Maintenance of RCSWMA's public service monopoly structure is vital to the conservation of Rockland County's environment and the continued health of Rockland County residents.

SUMMARY OF THE ARGUMENT

It is long-standing Supreme Court precedent that state and local governments may establish public service monopolies to enforce the police power without incurring liability under federal anti-trust restrictions The state action exemption from the Sherman Act reflects the Court's acknowledgment that the displacement of competition by a state as a means of enforcing its police power is an attribute of state sovereignty. By contrast, the dormant Commerce Clause was established by the Court to restrict states from exercising their power as sovereigns to promote parochial economic interests to the detriment of interstate commerce.

Petitioners seek a decision from this Court invalidating Respondents' public service monopoly in solid waste processing as a violation of the dormant Commerce Clause However, Respondents' public service monopoly is not motivated by economic protectionism but by a state environmental policy to reduce solid waste and advance the general well-being of the public The issues presented here test the balance between the Court's constitutional role as a safeguard of our federalist system and its assumed duty to limit state sovereignty to the extent it impairs the national economy

By displacing competition, public service monopolies permit state and local governments to enforce the police power through the implementation of uniform policies and procedures In the more than one hundred years since it enacted the Sherman Act, Congress has not seen fit to use its commerce power to restrict states' use of public service monopolies to enforce the police power. Furthermore, in its anti-trust jurisprudence, this Court has consistently interpreted Congress' inaction as recognition of state sovereignty

Respondents' displacement of competition in the market for solid waste processing is a valid exercise of the police power that does not result in differential treatment of intrastate as compared to interstate commerce Invalidation of Respondents' public service monopoly would therefore expand the scope of the dormant Commerce Clause – a judicial restriction of state sovereignty – to include anti-competitive conduct that the Court has previously accepted as a legitimate exercise of state authority Such an increased limitation of states' authority would irreparably disrupt the balance of federal and state power that is the mainstay of our federalist system

ARGUMENT

I. The State Action Exemption From Anti-Trust Restrictions, Long Recognized By The Court As An Attribute Of State Sovereignty, Should Not Be Eroded By An Unwarranted Extension Of Dormant Commerce Clause Jurisprudence

In response to anti-competitive business activity that consolidated wealth and power in the hands of a few individuals and corporations, Congress enacted the Sherman Act in 1890 by a nearly unanimous vote *See Standard Oil Co v United States*, 221 U S 1, 50, 31 S Ct 502, 512, 55 L Ed 619 (1911), Sherman Act, ch. 647, 26 Stat 209 (1890) The Sherman Act prohibits the "restraint of trade or commerce among the several states," Sherman Act, 15 U S C § 1 (2006), and codifies the notion generally held at common law that contracts in restraint of trade undermine "unfettered competition as the rule of trade" and are inimical to economic liberty. *N Pac Ry Co v United States*, 356 U S 1, 4, 78 S. Ct 514, 518, 2 L Ed 2d 545 (1958) It is generally

accepted that the Sherman Act is the *magna carta* of free enterprise *City of Lafayette, La v La Power & Light Company*, 435 U.S. 389, 398, n.16, 98 S Ct 1123, 1129, 55 L. Ed. 2d 364 (1978) (citing *United States v Topco Assoc*, 405 U.S. 596, 610, 92 S Ct 1126, 1135, 31 L. Ed 2d 515 (1972)) Its primary objective is to "secure equality of opportunity and to protect the public against evils commonly incident to monopolies which tend to directly suppress the conflict for advantage called competition . . ." *United States v Am Linseed Oil Co*, 262 U.S 371, 388, 43 S Ct 607, 67 L Ed. 1038 (1923).

The Fifty-First Congress' intent in passing the Sherman Act was examined by this Court in *Parker v Brown*, 317 U S 341, 63 S Ct 307, 87 L Ed 315 (1943) There, the Court concluded that, while the Act prohibits anti-competitive activity by individuals and corporations, there was no evidence that Congress intended that prohibition to extend to official or state action even if it resulted in the restraint of trade It was there recognized that the states were immune, when acting in their governmental capacity, from federal anti-trust prosecutions pursuant to the Sherman Act *Id* at 351 The state action exemption, as it is commonly known, is derived from the constitutional principles of federalism and state sovereignty *Id* at 350-51 Notwithstanding the powers delegated to the federal government by the Constitution, "the powers reserved to the several States extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State " *The Federalist* No 45, at 258 (Alexander Hamilton) (E H Scott ed. 1898) State action anti-trust immunity permits states to impose anti-competitive

restraints or regulations in their sovereign capacity *See Genentech, Inc v Eli Lilly and Co* , 998 F.2d 931, 948 (Fed. Cir 1993), *cert denied sub nom Regents of Univ of Cal v Genentech, Inc* , 510 U S 1140, 114 S. Ct. 1126, 127 L Ed 2d 434 (1994), *overruled on other grounds by Wilton v Seven Falls Co* , 515 U S 277, 115 S Ct 2137, 132 L Ed 214 (1995) Anti-competitive legislation adopted by state legislatures is therefore *ipso facto* exempt from federal anti-trust laws *See Hoover v Ronwin*, 466 U S. 558, 567-68, 104 S Ct 1989, 1995, 80 L Ed. 1989 (1984).

Although municipal corporations are not recognized in all respects as sovereign entities and do not enjoy the full constitutional protections afforded the states, the state action exemption has been deemed applicable to anti-competitive conduct by municipalities to the extent that they act as political subdivisions of the state *See City of Lafayette*, at 413. A municipal corporation is exempt from anti-trust laws so long as the anti-competitive activity is authorized by a "state policy to displace competition with regulation or monopoly public service " *Id* at 413 Thus, a municipal entity will not be liable in anti-trust where a state has a clearly articulated anti-competitive policy or even where it is merely foreseeable that anti-competitive conduct may result from state legislation. *See Town of Hallie v City of Eau Claire*, 471 U S 34, 42, 105 S Ct 1713, 1718, 85 L Ed. 2d 24 (1985) *See also* Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-6 (2006) (exempting local governments and their agents from liability under the Clayton Act)

Supreme Court precedent unequivocally recognizes the authority of state and local governments to engage in monopolistic and other types of anti-competitive conduct to achieve a legislatively defined end In the instant matter, the

Court has been asked to consider the constitutionality of Respondents' regulatory scheme for the management of solid waste through a public monopoly in solid waste processing It is argued, among other things, that Respondents' monopoly in solid waste processing is injurious to Petitioners because it eliminates out-of-state processors from the solid waste processing market in Oneida and Herkimer Counties However, it is clear from the state action doctrine that local governments, such as Respondents, are allowed to displace competition pursuant to a duly enacted state policy

The New York State Legislature has clearly articulated a policy authorizing the displacement of competition in the area of solid waste management through regulation and the provision of services by county government [4] The New York Solid Waste Management Act expressly provides for the adoption of solid waste management plans by local governments to advance the state's overall solid waste reduction, disposal, and recycling goals. *See* N.Y. Envtl Conserv Law §§ 27-106-07 (McKinney 2006) The New York State Legislature has also authorized the creation of solid waste management authorities such as RCSWMA and Oneida-Herkimer Solid Waste Management Authority to implement such plans *See* N Y Pub. Auth Law, §§ 2049-aa et seq., 2053-a et seq. (McKinney 2006). In addition "to further the governmental and public purposes of the authorit[ies]," the State has empowered Rockland, Oneida, and Herkimer Counties to adopt "local laws, ordinances and regulations imposing appropriate and reasonable limitations

4 The New York State Public Authorities Law explicitly declares that it is State policy "in the area of the control and management of solid waste to displace competition with regulation or monopoly control " N Y Pub Auth Law, §§ 2049-tt, 2053-v(2) (McKinney 2006)

on competition with respect to collecting, receiving . . [or] processing . solid waste." N.Y. Pub. Auth Law, §§ 2049-tt, 2053-v(2) (McKinney 2006).

Petitioners contend that Respondents cannot use a public monopoly structure to exert a regulatory affect in the market for solid waste management services because doing so constitutes an impermissible interference with interstate commerce. *See* Pet Br 30 But because Respondents have imposed regulatory restraints on the market for waste processing at the direction of the State, the state action exemption and the constitutional principles on which it relies instruct that Petitioners are not entitled to relief for any alleged restriction of their economy liberty *See Hancock Indus v Schaeffer*, 811 F.2d 225 (3d Cir 1986), *Town of Hallie*, 471 U S. at 34.

The Commerce Clause vests Congress with the power to regulate commerce among the states U S Const art I, § 8, cl. 3. However, as illustrated by the Sherman Act and this Court's state action exemption jurisprudence, Congress' power to regulate interstate commerce does not entirely foreclose the power of the states to affect commerce within their borders. Rather, "under our constitutional system, there necessarily remains to the States, until the Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected " *Breard v City of Alexandria, La* , 341 U S. 622, 634, 71 S. Ct 920, 928, 95 L Ed 1233 (1951) In giving Congress the authority to regulate commerce, the Framers did not intend to prohibit "the States from legislating on all subjects relating to the health, life and safety of their citizens " *Huron Portland Cement Co v City of Detroit*, 362 U S. 440, 443, 80 S Ct. 813, 816, 4 L Ed 2d 852 (1960)

Given the limits of Congress' commerce power, invalidation of public service monopolies under the dormant Commerce Clause seems unwarranted

Despite the positive power conferred to Congress by the Constitution to regulate interstate commerce, the Court has "consistently held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state . . . [legislation] even when Congress has failed to legislate on the subject " *Okla Tax Comm'n v Jefferson Lines*, 514 U.S 175, 179, 115 S. Ct 1331, 1335, 131 L. Ed. 2d 261 (1995), *reh'g denied* 514 U S 1135, 115 S Ct. 2018 (1995) The Court developed the dormant Commerce Clause to restrain states' exercise of their sovereign power but only insofar as states attempted to use their authority to promote private economic interests *See H P Hood & Sons, Inc v Du Mond*, 336 U S 525, 539, 532, 69 S. Ct 657, 666, 93 L. Ed 865 (1949) Through the continued application of the state action exemption, this Court has acknowledged that Congress "has done nothing to limit its unbroken recognition of the state regulatory authority that has created and preserved [. . .] local monopolies " *General Motors Corp v Tracy*, 519 U.S. 278, 305, 117 S Ct 811, 827, 136 L. Ed. 761 (1997) (recognizing the value of state-regulated monopolies for the sale and distribution of natural gas)

Petitioners argue that states and their political subdivisions do not have the authority to displace competition by establishing public monopolies to enforce the police power. *See* Pet Br. 25 If the Court were to accept Petitioners' argument, such a decision would result in a distinct incongruity between the recognition of state sovereignty in the exercise of the police power under the state action

exemption and the restraints imposed on state power by the Court's effort to curtail economic protectionism under the dormant Commerce Clause. The Court's anti-trust jurisprudence supports the proposition that principles of state sovereignty and federalism remove non-discriminatory public monopolies and their attendant regulations from the scope of dormant Commerce Clause restrictions.

II. Public Monopolies Designed To Implement Police Power And Which Even-Handedly Displace Competition Do Not Discriminate Against Interstate Commerce

The primary objective of the Commerce Clause was to ensure that "every farmer and every craftsman [would] be encouraged to produce by the certainty that he [would] have free access to every market in the Nation " *H P Hood & Sons, Inc* , 336 U.S. at 539 Accordingly, state legislation enacted for the purpose of improving a state's individual economic position to the detriment of all others violates the dormant Commerce Clause *Id* at 534-35 However, the Framers' goal of protecting interstate commerce "stands in sharp contrast to their jealous preservation of power over their internal affairs . . . There was no desire to authorize federal interference with social conditions or legal institutions of the states " *Id* at 533-34 To that end, the Commerce Clause does not constitute a surrender of the states' police power which confers broad authority "to prescribe regulations to promote the health, peace, morals, education, and good order of the people " *Barbier v Connolly*, 113 U.S 27, 31, 5 S Ct 357, 360, 28 L Ed 923 (1884) *See also R R Co v Husen*, 95 U S 465, 470-71, 24 L. Ed 527 (1877)

State legislation that is within the police power and is motivated by a state's obligation to protect the welfare of its

citizens, rather than economic protectionism, will be upheld notwithstanding adverse impacts on interstate commerce. *See Breard*, 341 U S 622. Public monopolies are a longstanding tool of municipal and state governments to impose regulation or provide services that are in the interest of the public welfare *New State Ice Co v Liebmann*, 285 U.S. 262, 304, 52 S Ct 371, 384, 76 L Ed 747 (1932) The municipal management of solid waste through regulations and exclusive franchises in particular has long been considered within the scope of states' police power *See Cal Reduction Co , v Sanitary Reduction Works of San Francisco*, 199 U S. 306, 26 S Ct 100, 50 L Ed 204 (1905). Because Respondents' public service monopoly in solid waste processing was created pursuant to a state policy dedicated to implementing the state's environmental policies, it is not within the ambit of the harm the Framers sought to avert by means of the Commerce Clause.

In dormant Commerce Clause jurisprudence a discriminatory state regulation is one that results in "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter " *Or Waste Sys , Inc v. Dep't of Envtl Quality of Or*, 511 U S 93, 99, 114 S. Ct. 1345, 1350, 128 L Ed 2d 13 (1994) Because discriminatory state regulations promote parochial interests and disrupt the national economy, such regulations are subject to a "virtually per se rule of invalidity " *Philadelphia v New Jersey*, 437 U.S. 617, 624, 98 S. Ct 2531, 2535, 57 L. Ed 2d 475 (1978) State and local regulatory schemes that displace competition and establish public monopoly services are non-discriminatory. *See USA Recycling, Inc v Town of Babylon, Inc* , 66 F 3d 1272 (2d Cir 1995), *cert denied*, 517 U.S 1135, 116 S Ct 1419, 134 L Ed 2d 544 (1996) Government's exclusion of all private

actors from a given market affords in-state businesses no protection from or preference over out-of-state competitors.

The regulatory scheme enacted by Oneida and Herkimer Counties to implement their integrated solid waste management plan has eliminated the market for solid waste processing within their territorial jurisdiction Local haulers and Petitioners alike are mandated to use the public processing facility and are equally deprived of the opportunity to employ less costly processing services available in either the intrastate or interstate market *See* Res Br 30-1. The jurisdictional limitations of neutral local regulations do not in and of themselves result in differential treatment of local and national enterprises *See Hancock Indus* , 811 F.2d 225 Monopoly public services are indeed bound to geographic markets but this merely reflects the nature of our federalist form of government and provides no evidence that the limits of the state action exemption from anti-trust have been exceeded. *See id*

Unlike prior dormant Commerce Clause cases presented to the Court, this case involves a non-discriminatory monopoly in public services within a well-recognized area of the police power. As explained in *Barbier*, 113 U.S at 31-32. "Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good " The anti-competitive regulation at issue here is thus distinguishable from an import ban, *see Fort Gratiot Sanitary Landfill, Inc v Mich Dep't of Natural Res* , 504 U S. 353, 112 S. Ct. 2019, 119 L Ed 2d 139 (1992); *Philadelphia*, 437 U S 617, or a surcharge that discriminates between local and out-of-state

businesses, *see Or Waste Sys , Inc* , 511 U S 93, *Chem Waste Mgmt v Hunt*, 505 U S 334, 112 S Ct 2009, 119 L. Ed 121 (1992), or a regulation that directs solid waste to a local business to the exclusion of all others, *see C&A Carbone, Inc , v Town of Clarkstown*, 511 U.S 3838, 114 S. Ct 1677, 128 L. Ed. 2d 399 (1994) *See also* Lincoln L Davies, Note, *If You Give The Court A Commerce Clause An Environmental Justice Critique Of Supreme Court Interstate Waste Jurisprudence*, 11 Fordham Envtl. L.J 207, 233-42 (1999) While Petitioners have focused on the anti-competitive nature of Respondents' public service monopoly, it is evident that not every restraint on trade - especially one whose detrimental effect on out-of-state and local businesses is identical - implicates the Commerce Clause *See H P Hood & Sons*, 336 U S 525.

III. The Preservation Of Public Monopolies Is Essential To Our Federalist Form of Government

The provision of public services and the enforcement of regulations by local government to protect the public welfare – especially the public health – is a tradition that was established in the colonies well before the adoption of the Constitution. *See* Wendy E Parmet, *Health Care and the Constitution Public Health and the Role of the State in the Framing Era*, 20 Hastings Const. L.Q 267, 290 (1992) (discussing a Massachusetts solid waste regulation from 1634) "When the Federal Constitution was adopted in 1789, it was an established fact that the states possessed the right to take suitable measures for the preservation of the health of their citizens." James A Tobey, *Public Health and the Police Power*, 4 N Y U L Rev 126, 126 (1927) The reservation of the police power to the states is an elemental aspect of our federalist system inasmuch as it demarcates

the bounds of state and federal government *See Gibbons v Ogden*, 9 Wheat 1, 6 L Ed. 23, 71 (1824). The states' police power is so integral to our form of government that it has even been asserted that "[M]uch of what citizens of the United States take for granted including . the security of the social order, the enjoyment of private life and property and most notably the health of the community, are dependent upon the exercise of power by state governments " James G. Hodge, Jr., *The Role of New Federalism and Public Health Law*, 12 J. L & Health, 309, 322 (1998) The power to regulate in order that the well-being of the public be preserved has even come to be recognized by some as an obligation of local government. Tobey, *supra* at 126 State and local governments' reliance on the public monopoly structure to effectuate the police power is equally well-established *See New Orleans Water-Works, Co v Rivers*, 115 U.S 674, 6 S Ct 273, 29 L Ed 525 (1885). *See* discussion *supra* Point I

The anti-competitive monopoly structure provides a mechanism by which state and local governments can implement uniform standards and procedures to ensure the general welfare of the public *See e g Slaughter-House Cases*, 83 U.S 36, 21 L Ed 394, 16 Wall 36 (1872), Res. Br 35 The displacement of competition allows state and local governments to regulate in a manner that is sufficiently comprehensive to secure the public good *See General Motors Corp* , 519 U.S at 290; *Town of Hallie*, 471 U.S. at 39 Respondents' public service monopoly in solid waste processing allows them to regulate the "waste stream" and to make certain the Counties fulfill their governmental obligation to maximize waste reduction and recycling. *See* Res Br. 36. Furthermore, the partial monopoly structure adopted by Oneida and Herkimer Counties permits

local government to exert a regulatory affect on solid waste management but does not require the Counties to expend the resources necessary to occupy an entire market.

The Court's state action precedent permits state and local governments to displace competition in an entire market regardless of any anti-competitive affect on the marketplace. *See Parker*, 317 U S. 341 Acceptance of Petitioners' arguments would judicially endorse the proposition that state and local governments cannot displace competition with a partial monopoly if doing so has an anti-competitive but non-discriminatory effect on related sectors of the market. From a practical perspective, state and local governments would be forced to either operate a complete public service monopoly that eliminated a market in its entirety or simply abandon public services in that area altogether regardless of the impact on public health. This all or nothing result would do little to further the economic liberty of those in the private sector While total public monopolies present limited opportunities for private sector participation through the contracting out of various services, the partial public monopoly structure enables state and local governments to regulate an industry by strategically displacing competition in a discrete area even as unfettered competition remains the rule of trade in the remainder of the market. Ironically, it is the latter approach, one that leaves a substantial sector of the industry open to free commerce, that Petitioners seek to foreclose in the name of economic liberty.

Constraining state and local governments' ability to regulate through anti-competitive conduct would inevitably diminish their capacity to exercise the police power effectively. The debilitation of what may be the primary

function of state and local governments should only be undertaken with complete certainty that doing so conforms with the form and substance of the theory of governance espoused by the Constitution A ruling in favor of Petitioners would be disruptive to our constitutional framework

To the extent Congress has spoken, it has elected not to preclude state and local governments' use of non-discriminatory public service monopolies *See* discussion *supra* Part I. At the core of Petitioners' claim lies the assertion that the Court should interpret Congress' silence as a prohibition against state enforcement of the police power through the displacement of competition *Contra Tyler v Pipe Indus v Wash State Dep't of Revenue*, 483 U S 232, 262 (1987) (Scalia, J , concurring in part, dissenting in part). *See* Pet Br 40 This particular incantation of the dormant Commerce Clause, however, finds little support in our Constitution and only intermittent support in the decisions of the Court *Id* Unlike other doctrines that inform the understanding of our system of governance, the dormant Commerce Clause is a judicial creation that should be employed with prudence. *See Tyler*, 483 U.S. at 257. Economic protectionism, the concern that motivated the Court's development of the dormant Commerce Clause, is conspicuously absent from the facts presented here. *See New Energy Co of Ind v Limbach*, 486 U S. 269, 273, 108 S. Ct 1803, 1807, 100 L. Ed 2d 302 (1988) Furthermore, this Court has already had occasion to interpret Congress' silence as to non-discriminatory, anti-competitive conduct by state and local governments exercising the police power and has held that such conduct is permissible. Given the foregoing, and that Congress has expressly recognized that it is the primary role of state and local as opposed to federal government to regulate solid waste management,

see Resource Conservation and Recovery Act, 42 U S C. § 6901(a)(4) (2006), it would seem evident that state and local governments can establish either a total or a partial non-discriminatory public monopoly to regulate and provide solid waste management services

For the Court to hold that non-discriminatory, anti-competitive regulation of solid waste management by state and local governments violates the dormant Commerce Clause, despite legislative and judicial evidence to the contrary, would implicate the doctrine of separation of powers and further complicate fundamental notions of federalism. *See* Davies, *supra*, at 250-51 Respondents' regulatory conduct must either be within the scope of Congress' enumerated powers or the within the purview of those powers reserved to the states; our federalist system dictates that it cannot lie within both Petitioners argue that *stare decisis* demands that the Court hold in their favor But a determination that state and local governments cannot displace competition to enforce the police power would extend the dormant Commerce Clause's restraint on state power beyond instances of economic protectionism and erode the capacity of states to operate as sovereigns within their sphere of governance

CONCLUSION

For the foregoing reasons, and those set forth in Respondents' brief, the judgment of the Court of Appeals should be affirmed

Respectfully submitted,

BRIDGET GAUNTLETT
General Counsel
ROCKLAND COUNTY SOLID
WASTE MANAGEMENT AUTHORITY
420 Torne Valley Road
Hillburn, NY 10931

ROBERT BERGEN*
TENO WEST
LEAH GRIGGS PAULY
HOLLAND & KNIGHT LLP
195 Broadway
New York, NY 10007
(212) 513-3200

Attorneys for Amicus Curiae

* *Counsel of Record*